(1) A declaration that the first, second, third, fourth, fifth and sixth defendants hold the shares issued by the first company, the ninth defendant, and registered in their respective names in trust for the plaintiff.
(2) A further declaration that the plaintiff is the sole beneficial owner of all the shares issued by the first company, the ninth defendant, save for the shares owned and registered in the name of the eighth defendant.
(3) As the share certificates were at all material times in the possession of the plaintiff, all the share certificates are to be returned to him and the defendants will hand over all the share certificates to the solicitors for the plaintiff within one week from the date of this order.
(4) The defendants will pay the costs of this application to the plaintiff.
(5) I make no further order in respect of the other payments, in view of the order made by VC George J on 12 April 1988 in Suit No D3-22-059-88.

Order accordingly.

Solicitors: *Veloo & Co; Mahadevi Nadchatiram & Partners; Sin & Associates; Durai & Associates; Lim Kian Leong & Co.*

Reported by *Yap Shao Sin*

Mohd Arshad bin Salleh v Yasin bin Ibrahim & Ors

HIGH COURT (KEDAH) — ORIGINATING SUMMONS NO 24-1389-89
KC VOHRAH J
24 FEBRUARY 1990

Land Law — 'Banci Sewa' — Deceased held land under 'Banci Sewa' — Land registered in administrator's name — Land occupied by defendants without consent — Application by administrator — Possession of land — Whether plaintiff had locus standi — Whether State land — Kedah Provisional Titles (Transitional) Rules 1967, rr 12 & 13 — National Land Code 1965

Words and Phrases — 'Banci Sewa' — Kedah Provisional Titles (Transitional) Rules 1967, rr 2, 12 & 13

Words and Phrases — 'Dealing' — National Land Code 1965, s 5

The deceased, Mat Arshad bin Hj Dolah, was granted a 'Banci Sewa' in respect of a piece of State land ('the said land') which was not alienated to him during his lifetime. When he died, the Collector of Land Revenue Pendang granted, under the then Small Estates Distribution Ordinance 1955, to the plaintiff letters of administration. The plaintiff in the capacity of administrator was registered as proprietor of the 'Banci Sewa'. This was an application made by the plaintiff by way of summary proceedings under O 89 Rules of the High Court 1980 to recover possession of the said land. The grounds were that the plaintiff, being the administrator of the estate of the deceased, was entitled to possession and that the occupiers, ie the defendants were in occupation without consent. The defendants argued that the said land was State land which had yet to be alienated; and that the State authority was the proper authority to resolve as to who was entitled to be alienated the said land.

Held, granting an order for possession :

(1) With the tangible attributes of land occupied under 'Banci Sewa' arising under rr 12 and 13 of the Kedah Provisional Titles (Transitional) Rules 1967, such land is State land which was given out for occupation to a person before 1 August 1935 and that such land has been provisionally marked for alienation to him. The provisions in the National Land Code 1965 relating to the rent due on and other incidents attaching to alienated land and forfeiture of the land to the State authority apply to a 'Banci Sewa' land as if the State land had been alienated. Under r 12, the person given a 'Banci Sewa' is the true owner of the land; what is required of him to obtain a qualified title (or grant or mukim grant) is to comply with r 15. If the owner has died, the administrator of his estate steps into his shoes. In the present case, the plaintiff was granted letters of administration and had locus standi to act for the estate of the deceased. The argument that the plaintiff had no locus standi to sue in this case must fail.

(2) As for the argument that since the land was State land the State must resolve the issue, the argument cannot succeed as the land in question was not State land simpliciter. It was given on a 'Banci Sewa' to the deceased and was not given to the defendants or to persons through whom they claim. There was no relationship whatsoever between the defendants and the persons through whom they claim on the one hand and the State on the other in so far as the said land was concerned. The land was not theirs and they had not shown that they had

entered into and remained in occupation of the said land with the licence or consent of the owner of the 'Banci Sewa', the deceased, or of the plaintiff as administrator of his estate.

(3) The court found that there were no triable issues in the case. The court therefore made an order for possession, but disallowed the plaintiff the costs of the application.

[Bahasa Malaysia summary

Mendiang Mat Arshad bin Hj Dollah, telah diberi satu 'Banci Sewa' berkenaan dengan sebidang tanah negeri ('tanah tersebut') yang tidak diberimilik kepadanya dalam tempoh hayatnya. Bila dia meninggal dunia, Pemungut Hasil Tanah Pendang memberi, di bawah Ordinan Pembahagian Pesaka Kecil 1955 ketika itu, kepada plaintif surat kuasa mentadbir pesaka. Dalam kedudukannya sebagai pentadbir, plaintif telah didaftar menjadi tuanpunya 'Banci Sewa' tersebut. Ini adalah satu permohonan yang dibuat oleh plaintif melalui prosiding terus di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 bagi mendapat kembali milikan tanah tersebut. Alasan-alasannya ialah plaintif, sebagai pentadbir pesaka simati, adalah berhak menerima milikan dan bahawa penghuni-penghuni, iaitu defendan-defendan adalah dalam penghunian tanpa kebenaran. Defendan-defendan berhujah bahawa tanah tersebut adalah tanah kerajaan yang belum lagi diberimilik; dan bahawa Pihak Berkuasa Negerilah pihak berkuasa yang layak dan sesuai bagi menyelesaikan siapakah yang berhak diberimilik tanah tersebut.

Diputuskan, memberi satu perintah untuk milikan:

(1) Dengan sifat semulajadi yang ketara dalam tanah yang dihuni di bawah 'Banci Sewa' tertimbul di bawah kk 12 dan 13 Aturan (Peralihan) Hakmilik-Hakmilik Sementara Kedah 1967, tanah tersebut adalah tanah kerajaan yang dikeluarkan bagi kediaman kepada seseorang sebelum 1 Ogos 1935 dan bahawa tanah tersebut telahpun ditanda buat sementara bagi pemberimilikan kepadanya. Peruntukan-peruntukan dalam Kanun Tanah Negara 1965 berkenaan dengan sewa yang terhutang pada dan lain-lain kejadian yang terlekat pada tanah yang diberimilik dan lucuthak tanah kepada Pihak Berkuasa Negeri terpakai kepada satu 'Banci Sewa' seakan-akan tanah negeri itu telah diberimilik. Di bawah k 12, orang yang diberi satu 'Banci Sewa' ialah tuanpunya sebenar tanah; apa yang dikehendaki daripadanya bagi memperolehi satu hakmilik sementara (atau geran atau geran mukim) ialah mematuhi dengan k 15. Jika tuanpunya telah meninggal dunia, pentadbir pesaka estetnya mengambil tempatnya. Dalam kes ini, plaintif telah diberi surat kuasa mentadbir pesaka dan mempunyai locus standi bagi bertindak untuk estet simati. Hujah bahawa plaintif tidak ada locus standi bagi menuntut dalam kes ini mesti gagal.

(2) Bagi hujah bahawa oleh kerana tanah adalah tanah kerajaan, dan kerajaanlah yang mesti menyelesaikan isu, hujah tersebut tidak boleh berjaya kerana tanah yang dipertikaikan itu bukanlah tanah kerajaan semata-mata. Ia diberi atas satu 'Banci Sewa' kepada simati dan tidak diberi kepada defendan-defendan atau kepada orang-orang melalui siapa mereka menuntut. Tidak ada apa-apa perhubungan langsung antara defendan-defendan dan orang-orang melalui siapa mereka menuntut di sebelah tangan dan kerajaan di sebelah yang lain sejauh mana yang berkenaan dengan tanah tersebut. Tanah bukan kepunyaan mereka dan mereka tidak menunjukkan bahawa mereka telah memasuki dan tinggal dalam penghunian tanah tersebut dengan lesen atau persetujuan tuanpunya 'Banci Sewa' itu, simati, atau plaintif sebagai pentadbir pesaka estetnya.

(3) Mahkamah mendapati bahawa tidak ada isu-isu yang boleh dibicarakan dalam kes ini. Jadi, mahkamah membuat satu perintah bagi milikan, tetapi tidak membenarkan plaintif kos permohonan.]

Case referred to

1 *Bohari bin Taib & Ors* v *Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 (distd)

Legislation referred to

Land Enactment No 56 (Kedah) s 2, chapter IV
National Land Code 1965 ss 3, 5, 42, 77(2), 215, 438(1), 445, Division III Parts Six, Seven, Eight, Thirteen, Fourteen, Twenty-two
Small Estates Distribution Ordinance 1955 s 13
Kedah Provisional Titles (Transitional) Rules 1967 rr 2, 12, 13, 15
Rules of the High Court 1980 O 89

Aishah bte Jaaffar for the plaintiff.
Kartar Singh for the defendants.

Cur Adv Vult

KC Vohrah J: This is an application by way of summary proceedings under O 89 to recover possession of land. There is also a prayer for a restraining order but it is obviously a misconceived prayer.

The application to recover possession of land is by Mohd Arshad bin Salleh, administrator of the estate of one Mat Arshad bin Hj Dolah. The principal prayer is for an order that he recovers possession of Plot No 120, Mukim Bukit Raja, Kedah held under a provisional title of 'Banci Sewa', Mat Arshad having been the registered owner of the land under a 'Banci Sewa'.

The grounds given in the application are 'that Mohd Arshad bin Salleh, the administrator of the estate of Mat Arshad bin Hj Dolah is entitled to possession and that the occupiers are in occupation without consent.' But the affidavit in support of the application is dismally short on the material facts necessary for the application.

Counsel for the defendants, with his usual candour, has filed two affidavits, one by the third defendant and another by the headman of the village where the said land is located, which disclose that the three defendants are in occupation of the said land. Several other matters have also been raised in these two affidavits and the plaintiff has filed a supplementary affidavit in reply.

What emerges from the four affidavits filed in this case is this. Mat Arshad bin Hj Dolah was granted a 'Banci Sewa' in respect of a piece of State land, Plot 120, Mukim Raja, Kedah. This lot, however, was not alienated to him during his lifetime. It is not known when he died but after his death, on 27 June 1964, the Collector of Land Revenue Pendang granted, under s 13 of the then Small Estates Distribution Ordinance, 1955, to the plaintiff letters of administration, the grant being limited to the collecting or the gathering of pro-

ceeds as well as to the taking care of properties of the deceased and for the settling of the debts of the deceased according to the order of the Collector of Land Revenue. The schedule to the grant shows the property of the estate of Mat Arshad as being a piece of padi land held under 'Banci Sewa', No 120 Mukim Bukit Raja. There is a certificate dated 7 December 1964 by the Land Officer Pendang that Mohd Arshad bin Salleh (the plaintiff) in the capacity of administrator is 'registered as proprietor' of the 'Banci Sewa'.

The application to the collector for distribution of the said land to beneficiaries of the estate of the deceased was cancelled when one Bakar, now deceased, objected to the distribution of the land.

What is alleged by the third defendant, wife of the said Bakar and not disputed by the plaintiff, is that Bakar's father, Kadir bin Hj Idris, had cleared the said land and that he had a house on it. Kadir's grandson, the first defendant, now lives in the house. When Kadir died his son, the said Bakar, continued clearing the land and developed it for padi cultivation and he built another house on the land; the third defendant and her daughter, the second defendant, now live in the house. The defendants argue that the said land is State land; that the land has yet to be alienated; and that the State authority is the proper authority to resolve as to who is entitled to be alienated the land and they say the recent Supreme Court decision in *Bohari bin Taib & Ors* v *Pengarah Tanah Galian Selangor*,[1] is in their favour. The defendants also argue that the plaintiff has no *locus standi*.

What has to be borne in mind is that the National Land Code 1965 ('the Code') and the rules made thereunder now govern the land law in the state of Kedah relating to provisional titles. These provisional titles were creatures of Land Enactments which were in force prior to 1 August 1935 (the date on which the Kedah Land Enactment No 56 came into force). The Land Enactment No 56 continued to give life to these provisional titles; in s 2 specific references were made to these provisional titles in respect of State land which included land occupied 'under permit, banci sewa entry, surat akuan or under a licence for temporary occupation'; and a surat akuan, permit and banci sewa for the limited purposes of chapter IV of the Land Enactment relating to conditions and obligations which could be imposed on State land were deemed included within the meaning of a 'document of title.'

The Code came into force on 1 January 1966 (see s 3 of the Code and LN 477/1965) and it repealed, inter alia, under s 438(1) read with the 11th Schedule thereof, Land Enactment No 56 of the State of Kedah on the same date. And transitional rules relating to the provisional titles referred to in the Land Enactment No 56, titled the Kedah Provisional Titles (Transitional) Rules 1967 (KPU 8/1967) ('the Rules') were made under s 445 of the Code. Under r 2 of the Rules, a 'Banci Sewa' is included in the definition of 'Provisional Title' and under r 12 'Banci Sewa' is defined to mean a document 'evidencing ownership issued under the provisions of any Land Enactment in force prior to 1 August 1935 (date of coming into force of Land Enactment No 56).'

For the purpose of this case what is important is r 13 which reads:

> Land occupied under Permit or Banci Sewa shall be deemed to be State land but for the purposes of Parts Six, Seven, Eight, Thirteen, Fourteen and Twenty-two of the Code shall be deemed to be alienated land.

Part Six of the Code deals with rent due to the State authority on alienated land. Parts Seven and Eight fall under Division III of the Code relating to the incidents of alienated land. Part Seven relates to conditions and restrictions in interest in respect of alienated land. Part Eight deals with forfeiture of the land for non-payment of rent or breach of condition. Thus land held under a Banci Sewa, under r 13, is subject to these three Parts as if it is alienated land.

Part Thirteen of the Code relates to provisions on 'dealings' in alienated land. A 'dealing' is defined under s 5 of the Code as transactions 'with respect to alienated land effected under powers conferred by Division IV of the Code and any like transactions effected under the provisions of any previous land law, but does not include any caveat or prohibitory order'. Part Thirteen makes provisions with those dealings capable of being effected under the Code with respect to alienated land and interests thereon and with the persons capable of taking thereunder. It also makes provisions, inter alia, as regards the proper instruments to be used, their contents, their execution and their registration. Part Fourteen of the Code makes provision, inter alia, as to what may be transferred and with the restrictions on the exercise of powers in respect of, inter alia, alienated land. Under s 215, falling under Part Fourteen, the transfer of any land shall be effected by an instrument in Form 14A. And s 215(2) states that the title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered instruments then enjoyed in the land. Thus with r 13 of the Rules a 'Banci Sewa' is clothed with the attributes of alienated land for the purposes of Parts Thirteen and Fourteen and can be the subject matter of a 'dealing' and its transfer is effected by an instrument under Form 14A; it follows that the provisional title of the transferor, the 'Banci Sewa', shall pass to and vest in the transferee.

As for Part Twenty-two of the Code, it contains provisions relating to the transmission of alienated land

on the death of the proprietor of the land or on his bankruptcy. Rule 13 of the Rules provides for land occupied under 'Banci Sewa' to be deemed as alienated land for the purposes of Party Twenty-two of the Code. In other words, the land by an owner under 'Banci Sewa' may be registered in the name of the personal representative to be held in trust for the beneficiaries on the death of the owner.

To sum up, with the tangible attributes of land occupied under 'Banci Sewa' arising under rr 12 and 13 of the Rules, one may say that such land is State land which was given out for occupation to a person before 1 August 1935 (the date on which the now repealed Kedah Land Enactment came into force) and that such land has been provisionally marked for alienation to him. The provisions in the Code relating to the rent due on and other incidents attaching to alienated land and forfeiture of the land to the State authority apply to a 'Banci Sewa' land as if the State land had been alienated. And the land may be bought and sold as if it is alienated land and it is also considered as an asset of the estate of a deceased and can be transmitted to a personal representative who will hold it on trust for the beneficiaries of the estate. To all intents and purposes, bearing in mind r 12, the person given a 'Banci Sewa' is the true owner of the land and what is required of him to obtain a qualified title (or Grant or Mukim Grant) is to comply with r 15. If the owner has died, the administrator of his estate steps into his shoes. In the present case the plaintiff was granted letters of administration under the Small Estates Distribution Ordinance 1955. The plaintiff has *locus standi* to act for the estate of the deceased. And so the argument that the plaintiff has no *locus standi* to sue in this case must fail.

As for the argument that since the land is State land the State must resolve the issue, the argument cannot succeed as the land in question is not State land *simpliciter*. It was given on a 'Banci Sewa' to Mat Arshad bin Hj Dolah. It was not given to the defendants or to persons through whom they claim. There is no relationship whatsoever between the defendants and the persons through whom they claim, on the one hand, and the State on the other in so far as the said land is concerned. The land is not theirs and they have not shown that they had entered into and remained in occupation of the land with the licence or consent of the owner of the 'Banci Sewa', Mat Arshad bin Haji Dolah, deceased, or of the plaintiff as administrator of his estate.

With what I have stated above, with respect, I do not think the case of *Bohari bin Tambi & Ors* v *Pengarah Tanah Galian Selangor*,[1] supports the argument of the defendants that there are triable issues. In that matter the case of the parties in occupation of State land against the Pengarah Tanah dan Galian was that they were in occupation of the land with the consent of the State prior to the grant of temporary occupation licence from 1981 to 1983, this being part of the chain of events supporting the existence of an approval of alienation of the lands to them by the State authority under s 42 of the Code. They argued that pending issue of titles under s 77(2) they were entitled to remain on the land not as squatters but as of right. The Supreme Court held there were triable issues and held that the case should not have been dealt with summarily under O 89. Here in this case, as stated earlier, there is no nexus between the defendants and the persons through whom they claim on the one hand and the State on the other in respect of the land. The State had given the land to Mat Arshad bin Haji Dolah to be held under a provisional title, 'Banci Sewa', and when he died this land was transmitted to the plaintiff as administrator. The question is whether Mat Arshad or the plaintiff as the administrator of his estate gave the defendants or the persons through whom they claim licence to occupy the land or consented to their staying on the land. The answer is in the negative as there is nothing in any of the affidavits showing that the defendants or the persons through whom they claim are occupying the land with the licence or consent of Mat Arshad's estate. In fact, the defendants deny that Mat Arshad was owner of the land. In other words, there are no triable issues in the case. I therefore make an order for possession. I have already pointed out the shortcomings in the application and I disallow the plaintiff the costs of this application.

Application allowed.

Solicitors: *Aishah Jaaffar & Associates; Kartar Singh Dhaliwal & Co.*

Reported by *Eunice Lee*